Phelps v Development Consent Authority & Ors [2012] NTCA 2

PARTIES:	PHELPS, Denise v DEVELOPMENT CONSENT AUTHORITY And: LANDS PLANNING AND MINING TRIBUNAL And: NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL APPEAL FROM THE SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	AP 5 of 2011 (20621279)
DELIVERED:	20 January 2012
HEARING DATES:	3 November 2011
JUDGMENT OF:	RILEY CJ, MILDREN AND SOUTHWOOD JJ
APPEAL FROM:	KELLY J

CATCHWORDS:

PLANNING APPEAL – Appeal confined to errors of law – rural land – application for consent to subdivision – special circumstances – whether restrictive covenants amount to special circumstances justifying consent – efficacy of enforcing restrictive covenants – whether Lands, Planning and Mining Tribunal has jurisdiction to make an "in principle" determination – decision not vitiated by an error of law

Land Title Act s 112
Lands, Planning and Mining Tribunal Act s 6
Law of Property Act s 169, s 170
Planning Act s 3, s 9, s 44, s 46, s 51, s 52, s 53, s 53, s 55, s 75, s 75, s 75, s 75A, s 85, s 85, s 111, s 130, s 133
Territory Parks and Wildlife Conservation Act s 74, s 74A

Alice Springs Town Council v Mpweteyerre Aboriginal Corporation (1997) 139 FLR 236
Crestwood Phoenix Darwin Pty Ltd v Kamarakis [1996] NTSC 104
Development Consent Authority v Phelps (2010) 27 NTLR 174
Leichardt Municipal Council v Seatainer Terminals Pty Ltd (1981) 48 LGRA 409
Tiver Constructions Pty Ltd v Clair (1992) 110 FLR 239

REPRESENTATION:

Counsel:

Appellant:	Mr Wyvill SC
Respondent:	Ms S Brownhill

Solicitors:

Appellant:	Ward Keller
Respondent:	Solicitor for the Northern Territory

Judgment category classification:	B
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IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Phelps v Development Consent Authority & Ors [2012] NTCA 2
No. AP 5 of 2011 (20621279)

BETWEEN:

DENISE PHELPS
Appellant

AND:

DEVELOPMENT CONSENT AUTHORITY
First Respondent

AND:

LANDS PLANNING AND MINING TRIBUNAL
Second Respondent

AND:

NORTHERN TERRITORY OF AUSTRALIA
Third Respondent

CORAM: RILEY CJ, MILDREN AND SOUTHWOOD JJ

REASONS FOR JUDGMENT

(Delivered 20 January 2012)

RILEY CJ:

[1] I agree that the appeals should be dismissed for the reasons expressed by Mildren J and Southwood J.

MILDREN J:

Background

[2] The appellant is the owner and registered proprietor of Lot 5251 Thorak Road, Berrimah (the land). The land is 6.93 hectares in area and is zoned R (for rural) under the current Northern Territory Planning Scheme (NTPS). The current minimum lot size for land in Zone R is 8 hectares. The primary purpose of R zoning is "to provide for a range of activities including residential, agricultural and other rural activities".

[3] On the land there is a seven bedroom residence occupied by the appellant and her husband, together with sheds and gardens. The land has an irregular shape, somewhat like the letter "P", (although the stem of the letter is not at all as narrow as this might suggest). The block has a frontage of 148 m onto Thorak Road (running northeast). The total length of the boundaries of the block is 1,315 metres.

[4] The residence, sheds and gardens have been built on the top area of the north western section of the block. The residence is served with power and water, and a septic tank. A large portion of the block is covered by native vegetation.

[5] The residence is occupied by the appellant and her husband. Their children having grown up and found homes of their own, the residence is now too large. Maintaining the block against fire risk is also expensive. The appellant wishes to subdivide the block into two lots, referred to as Lot A

and Lot B. Lot A would be a battle-axe shaped block comprised of 4 hectares. It would include a road corridor to Thorak Road. Lot A would comprise the existing residence, sheds and gardens. Lot B, comprising 2.93 hectares, would take up the stem of the letter "P", less the road corridor which would be 10m wide and 264m long. The appellant proposes to sell Lot A, and build a new, smaller residence on Lot B where she and her husband will reside. In order to protect the existing environment, the appellant proposed to grant easements in gross over both lots which contained covenants limiting the uses to which both blocks could be put. Subject to certain selective clearing proposed by the appellant to enable the new residence to be built with a shed and swimming pool, further clearing of the land would be prohibited.

[6] The appellant's proposals required by law the consent of the Development Consent Authority (DCA). In 2006 the appellant sought the relevant consent. Her application was refused. In September 2006, the appellant appealed to the Northern Territory Lands Planning and Mining Tribunal (the Tribunal). In January 2007 the Tribunal dismissed the appeal. In September 2007 the Supreme Court allowed the appellant's appeal to it by consent, and remitted the matter to the Tribunal. On 5 December 2008 the Tribunal again dismissed the appeal. That appeal was allowed by the Supreme Court on 21 October 2009 (Kelly J)[1] and the matter was again remitted to the

[1] (2009) 27 NTLR 164.

Tribunal. An appeal to this Court from Kelly J's decision was dismissed[2]. The Tribunal reconsidered the matter and dismissed the appeal again on 20 December 2010. From that decision the appellant appealed to the Supreme Court (Kelly J) who dismissed the appeal on 21 April 2011[3]. The appellant now appeals to this Court.

The nature of the appeal

[7] An appeal to the Supreme Court from the Tribunal lies only upon an error of law[4]. An appeal to this Court is similarly limited. The critical question before this Court is whether the Supreme Court, not the Tribunal, committed an error of law[5]. Of course, if the Tribunal made an error of law which vitiated the decision appealed from and which was not corrected on appeal to the Supreme Court, when it should have been, that would amount to an error by the Supreme Court. In order to succeed in this Court, the appellant must identify an error of law which vitiated the decision appeal from[6].

The statutory provisions

[8] Section 44 of the Act provides that Part 5 of the Act, which deals with Development Permits, applies in the following circumstances:

> "(a) if a provision of a planning scheme allows development only with the consent of the consent authority;
>
> (b) if the proposed development is the subdivision or consolidation of land".

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2 (2010) 27 NTLR 174.
3 [2011] NTSC 34.
4 *Planning Act*, s 133(1).
5 *Development Consent Authority v Phelps* (2010) 27 NTLR 174 at 177; par [9] to par [10].
6 *Development Consent Authority v Phelps* (2010) 27 NTLR 174 at 177 [par 11].

[9] "Development" is defined by s 3(1) of the Act to mean, in relation to land, inter alia, an activity that involves the subdivision or consolidation of land.

[10] Section 46 of the Act permits the owner of land to apply to the consent authority to carry out a development on the land. Section 46(3) of the Act sets out the information which the development application must address. After the public notice requirements in Part 5 Division 2 have been complied with, and submissions (if any) have been received, the DCA is required to consider the factors set out in s 51 of the Act before reaching its decision. Section 52 of the Act provides for certain restrictions on the power of the DCA to give consent. Section 53 provides:

> "As soon as practicable after considering a development application and the matters referred to in sections 51 and 52, the consent authority must determine to:
>
> (a) consent, either conditionally or unconditionally, to the proposed development;
>
> (b) alter the proposed development in the manner it thinks fit and consent, either conditionally or unconditionally, to the proposed development as altered; or
>
> (c) refuse to consent to the proposed development."

[11] Amongst the matters which the DCA is required to take into account in considering the application, is "any matters it thinks fit"[7]. Amongst the matters which s 53 precludes the granting of consent are circumstances where the proposed development is contrary to a planning statement of

[7] S 51(t).

policy in respect of the use or development of land[8] or provisions in a planning scheme that permit, prohibit, restrict or impose conditions on a use or development of land[9]

[12] The NTPS provides by cl 2.6 that land may be subdivided only with consent and subject to the relevant provisions of Part 5 of the NTPS. The minimum lot size for land zoned "R" is 8 hectares[10]. The purpose of the minimum lot size is to ensure that land within the zone will be of a size capable of accommodating potential future uses[11]. The primary purpose of Zone R is to provide for a range of activities including residential, agricultural and other rural activities[12]. Clause 50.2.2 of the NTPS provides that the larger lot sizes in Zone R "facilitate the separation between potentially incompatible uses and restrict settlement". Clause 2.5.3 of the NTPS provides:

> "The consent authority may consent to the development of land that does not meet the standard set out in Parts 4 or 5 only if it is satisfied that special circumstances justify the giving of consent".[13]

[13] Consequently, subject to the restrictions set out in s 52 of the Act, the appellant was required to satisfy the DCA that special circumstances justified the giving of consent.

[14] The matter remitted to the Tribunal by the Supreme Court's decision of 21 October 2009 was an appeal under s 111 of the Act. The Tribunal, like

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[8] S 9(1)(a).
[9] S 9(1)(b).
[10] NTPS cl 11.1.1.2. The lot in question was created well before the minimum 8 ha lot size came into force.
[11] NTPS cl 11.1.1.1.
[12] NTPS cl 5.20.1.
[13] Clause 11 of the NTPS is within Part 5.

the DCA, was required to take into account the matters specified in s 51[14] and could not determine an appeal to permit a proposed development in circumstances where the proposal contravened a planning scheme provision referred to in s 9(1)(a) or s 9(1)(b) of the Act[15].

[15] Clause 10.2 of the NTPS also dealt with the clearing of land in Zone R. Clause 10.2.5 precluded the clearing of native vegetation of more than one hectare in aggregate of land (including any area already cleared of native vegetation) without consent (subject to certain exceptions relating to firebreaks). The Tribunal noted that the land already has well over one hectare already cleared, and that if the property remained in its present form, any further clearing would require consent[16].

The appellant's argument that special circumstances existed

[16] The appellant's case before the Tribunal rested upon the planning advantages which would be achieved by the proposed covenants. The appellant submitted that the covenants:

1. Would provide protection of areas of important and rare native vegetation in the locality above that afforded to R zoned land under the NTPS.

2. Would prohibit otherwise permitted uses under the current zoning, including "agriculture", "home based contracting", "horticulture"

[14] S 130(2) of the Act.
[15] S 130(3) of the Act.
[16] Decision of Tribunal 20/12/2010, par 42.

and “plant nursery” each of which would adversely affect the area for various reasons.

3. Would completely prohibit consent uses including “animal boarding”, “intensive animal husbandry”, “stables”, “rural industry” and “transport terminal”, which it was submitted had the potential to adversely affect the area.

4. Would preserve the natural amenity of the area.

5. The average lot size accorded with the existing functionality of the locality.

6. Provided a buffer zone for the Knuckey Lagoon Conservation Reserve which adjoined the block on its western boundary.

7. Would be viewed in future as a precedent beneficial to environmental protection and the enhancement of the amenity of the neighbourhood.

8. Would overcome a multitude of erroneous administrative and quasi-judicial decisions which have put the appellant to unwarranted expense, stress and inconvenience.

[17] The Tribunal, when it rejected the appeal, concluded that although the covenants did amount to “special circumstances”, they did not warrant the granting of consent because the proposed covenants would not be more effective in protecting the environment than the present regime. In arriving

at this decision, the appellant complains that the Tribunal, and the Court in upholding the Tribunal's decision, made errors of law.

Ground 2(a) of the appeal

[18] This ground complains that the Court below "erred in law in failing to conclude that the Tribunal had erred in law in taking into account the alleged influence of "political motivations" in relation to the proposed covenants, particularly in the absence of any evidence to this effect and s 85 of the *Planning Act*.

[19] The Court below rejected the submission that the Tribunal made an impermissible finding not based on any evidence that Ministers of the Crown would act otherwise than in the public interest. Her Honour found that the Tribunal properly recognised that a Minister exercising executive power to decide whether or not to institute proceedings to enforce a covenant could properly take into account a wide range of political matters considered to be in the public interest at the time of making that decision.

[20] As Ms Brownhill submitted, the Tribunal's finding that the DCA has a level of autonomy from government because of s 85(1) of the *Planning Act*, was made in the context that clearing of land under the NTPS requires the consent of the DCA. This would require an application for development consent under the relevant provisions of Part 5 of the Act. Section 85(1) provides that the Minister may direct the DCA generally or in respect of a

particular matter other than the determination of a particular development application. 'Development' is defined to include land clearing[17].

[21] Counsel for the appellant submitted that there was no basis in fact or law for concluding that the enforcement of conservation covenants by the relevant Minister would be undertaken any less effectively or with regard to materially different matters than the enforcement of the provisions of the NTPS by the DCA.

[22] In my opinion, this submission must be rejected. It is by no means clear which Minister would have responsibility for the enforcement of the proposed covenants on behalf of the Northern Territory (being the entity with the benefit of covenants). One possibility is that, if the Tribunal's order granting consent was subject to a condition that the restrictive covenants must be complied with, the mechanism for enforcement would fall under Part 6 of the *Planning Act*. The relevant Minister having responsibility for such enforcement is the Minister for Lands and Planning. Alternatively, the appellant submitted that the covenants may be made with the Parks and Wildlife Commission established under the *Parks and Wildlife Commission Act*, pursuant to s 74 of the *Territory Parks and Wildlife Conservation Act*. Under s 74A of the latter Act, the covenants are registrable as covenants in gross and are enforceable by the Minister for Parks and Wildlife.

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[17] *Planning Act*, s 3(1).

[23] I agree with the submission of Ms Brownhill and with the Court below that Ministers having different responsibilities are not necessarily going to always agree on what are the paramount considerations when considering enforcement provisions in relation to a particular breach. A Minister with planning responsibilities may take into account factors which a Minister with responsibility for the environment may not consider important. I accept also that a Minister may take into account political considerations which are relevant to the proper purposes for which the powers and functions may be exercised.

[24] In any event, the restrictive covenants may be varied by consent of the parties under s 74A(1) of the *Territory Parks and Wildlife Conservation Act*, or, according to the terms of the draft covenants, by clause 8.1.1, or by the Northern Territory removing the covenant (clause 8.1.2)[18].

[25] Ms Brownhill submitted that the Tribunal's point was to contrast the provisions relating to constraints on land clearing by comparing the regime provided for under the *Planning Act* with the regime provided for under the proposed covenants. Under the *Planning Act*, the decision must be made by an autonomous DCA which requires consideration of the NTPS and the land clearing guidelines, but which may permit consent to be given; whereas enforcement of the covenants by the relevant Minister would require a

[18] See also *Land Title Act*, s 112.

decision by the Minister to make an application to a Court of competent jurisdiction and may well involve different considerations.

[26] I do not consider that this ground of appeal is made out.

[27] Even if error had been established on this ground, I do not consider that the error is a vitiating error. The Tribunal's conclusion was based on a range of factors including the conclusion reached that the proposal was a de facto rezoning of the resultant lots outside of the processes provided for by the *Planning Act*, the establishment of a bad precedent and other factors.

Ground 2(b) of the appeal

[28] This ground, which is an alternative to ground (a), is that Kelly J erred in concluding that s 75(3) of the *Planning Act* was not "apt" to be used to ensure that the DCA itself could enforce the covenants and that the Tribunal erred in failing to proceed on the basis that the DCA itself could enforce the covenants.

[29] The appellant's proposal to the Tribunal was that the Tribunal order the DCA to issue a permit on condition that the appellant and her successors in the title comply, and continue to comply with the terms of the covenants once registered.

[30] Mr Wyvill SC submitted that the DCA could enforce the covenants under the powers granted to it by s 75(3) of the *Planning Act*. There is an immediate difficulty with the argument in so far as it related to the clearing of native

vegetation (clause 4.3 of the proposed covenant) because s 75(1A) of the *Planning Act* specifically provides that s 75 does not apply in relation to the development of land under s 75A (which prohibits the development of land by the clearing of native vegetation without a permit). Presumably, notwithstanding the covenant, the DCA could grant a permit to so develop the land using its powers under the *Planning Act*.

[31] Be that as it may, in my opinion Kelly J was right to conclude that the provisions of s 75(3) of the *Planning Act* were not apt to enforce the restrictive covenants. Paragraphs (a) and (b) of s 75(3) operate to create an offence if a person uses or develops land otherwise than "in a manner that is only permitted in accordance with a permit". Except in one minor respect, the covenants do not permit the future use or development of land which are sought to be prevented by s 75(3) – they prohibit them. Thus, notwithstanding that the covenants provide that the land cannot be used for "agriculture", "home based contracting", "horticulture" and "plant nursery" those are all permitted uses under the NTPS and do not require a permit.

[32] In my opinion, it has not been shown Kelly J was in error on this ground.

Ground 2(c) of the appeal

[33] This ground was abandoned and it is not necessary to consider it further.

Ground 2(d) of the appeal

[34] This ground complains that Kelly J erred in concluding that there was no power in the Tribunal to make a decision on the condition that the appellant

execute and register on the land covenants containing certain particular obligations and to invite the parties to attempt to agree the precise terms of the covenants, reserving to itself the power to adjudicate on any dispute as to those precise terms.

[35] The order sought by the appellant from the Tribunal was:

> "The Applicant cause to be registered over proposed Lot A a covenant in terms substantially the same as set out in the draft at AB/5B/221 and over Lot B a covenant in terms substantially the same as set out in the draft at AB/5b/227 or on such terms as the Applicant and the Respondent may subsequently agree (with liberty to apply)".

[36] The evidence was that the appellant had approached the Department of Natural Resources, Environment, the Arts and Sport with a proposed agreement for the covenants to be registered as covenants in gross under s 74 of the *Territory Parks and Wildlife Conservation Act*. The Department advised the appellant by letter:

> "You have advised of an application to subdivide the block into two lots. Given this, it is administratively preferable to wait until the subdivision is dealt with before formalising the agreement. Should the subdivision be successful then separate agreement for each newly subdivided lot will be finalised.
>
> Attachments A and B are the draft agreements you have provided for the proposed lots. Both may require some minor amendment by the Department of Justice however the intention of each agreement is clear".

[37] Thus, whilst the appellant was able to place before the Tribunal the substance and intent of the proposed covenants, their precise terms remained to be finalised.

[38] The Tribunal held that once it had directed the issue of a permit on conditions, it had "no further power to enforce or vary those conditions and it has no supervisory role to ensure the conditions are complied with …".

[39] Justice Kelly held that the Tribunal had not erred on this point. She held that by seeking liberty to apply the appellant was doing more than asking the Tribunal to make a decision in principle, (which she doubted whether the Tribunal could do anyway), because, by asking the Tribunal for liberty to apply, the appellant was asking the Tribunal to make a further decision, ie adjudicate between the DCA and the appellant if they failed to reach agreement on the content of the covenants. Her Honour held that the Tribunal had no power to perform that function.

[40] Mr Wyvill SC submitted that, under s 53(b) of the *Planning Act*, the DCA had power to "alter the proposed development in the manner it thinks fit and consent, either conditionally or unconditionally, to the proposed development as altered …". He submitted that it was open to the DCA to decide the issues of substance in favour of an applicant for development consent, and leave an element of detail to be decided later if the parties were unable to reach agreement. His submission was that similarly, the Tribunal had the same powers as the DCA under s 130 of the *Planning Act*. He relied

also on s 6 of the *Lands Planning and Mining Tribunal Act* which empowers the Tribunal "to do all things necessary or convenient to be done in connection with the performance of its functions".

[41] Counsel for the respondents Ms Brownhill submitted that s 53 is not a source of the Tribunal's powers, and that altering a development proposal is not incidental to determining an appeal under s 130. She submitted that an order granting liberty to apply is beyond the Tribunal's powers because, once an order is made under s 130(4) of the *Planning Act*, the Tribunal is *functus officio*.

[42] However that may be, in my opinion it would have been open to the Tribunal to indicate to the parties that the Tribunal was considering allowing the appeal, and adjourning further consideration of the appeal pending the receipt of further information and submissions relating to the precise wording of the covenants, without binding itself to what its final decision might be. This does not appear to have been suggested to the Tribunal.

[43] The Tribunal's powers under s 130(4)(c) of the *Planning Act* permit the Tribunal to order the DCA to issue a development consent subject to any conditions it thinks fit. This is a broad power. It would not be in the interests of the proper determination of appeals to give this power a narrow construction. If the development application, the subject of an appeal, could not be decided favourably because of some relatively minor matter of detail which remains unresolved, this would not be consistent with the objects of

the Act, the NTPS, or the interests of justice or the incidental powers of the Tribunal. To that extent I think it would be open to the Tribunal, in an appropriate case, to decide the precise words of the covenants as part of the conditions for the grant of consent.

[44] Although it is clear that the Tribunal entertained a concern about lack of certainty of the covenants as one of the reasons for refusing the appeal, it was by no means the only reason. The Tribunal had a discretion whether or not to allow the appellant the opportunity to reach agreement with the DCA covering the exact terms of the covenants, but it was not obliged to do so. The tenor of the Tribunal's decision is that there were other compelling reasons as well. The Tribunal said:

> "The creation of only one more residential property, the further clearing of vegetation, the decrease of the buffer between inconsistent uses and the uncertainty in the enforcement as drafted are all reasons why consent is not justified in this matter".

The Tribunal went on to say that:

> "The possibility that the proposal might provide further protection of the environment does not outweigh the possibility of opening the floodgates to the ad hoc rezoning of the area".

[45] It has not been shown that, even if the Tribunal misunderstood its powers, there was any vitiating error, in the sense that there was a real possibility that the Tribunal's decision would have been any different.

[46] I would dismiss the appeal.

SOUTHWOOD J:

Introduction

[47] The appellant owns a 6.93 hectare block of land at 95 Thorak Road, Berrimah in the rural area south of Darwin ("the Land"). The land is near Knuckey Lagoons. On 2 June 2006 the appellant applied to the respondent for consent to subdivide the Land into two lots, one of four hectares ("Lot A") and the other of 2.93 hectares ("Lot B"). The appellant's intention is to sell proposed Lot A, which contains a 7 bedroom house, sheds and garden, and develop proposed Lot B, which consists largely of remnant bushland, by building another house with shed, pool and gardens. The appellant intends to reside on proposed Lot B.

[48] The Land is currently zoned R (for Rural) under the current Northern Territory Planning Scheme. The minimum lot size in zone R is 8 hectares. The respondent can only consent to the subdivision of the Land into lots of sizes smaller than 8 hectares if it is satisfied that there are "special circumstances" that justify giving such consent[19]. The appellant attempted to bring herself within the "special circumstances" exception by offering, as a condition of obtaining consent to the subdivision, to register restrictive covenants over the two proposed subdivided lots in accordance with s 74 and s 74A of the *Territory Parks and Wildlife Conservation Act* and s 169 of the *Law of Property Act*. The draft covenants: (1) limit further clearing of

[19] Northern Territory Planning Scheme cl 2.5.3 which states: The consent authority may consent to the development of land that does not meet the standards set out in Parts 4 or 5 only if it is satisfied that special circumstances justify the giving of consent.

native bushland on the lots, after the land is cleared to build a house on Lot B; (2) limit the use of the lots to residential use; and (3) prescribe the methods of waste disposal on the two lots.

[49] The respondent and the Lands Planning and Mining Tribunal ("the Tribunal") have consistently refused consent to the proposed subdivision and there have been a number of appeals to the Supreme Court and the Court of Appeal. Of significance to this appeal, on 5 December 2008 the Tribunal constituted by Dr Lowndes SM refused to consent to the appellant's application for subdivision. His Honour found that the covenants offered by the appellant did not amount to special circumstances within the meaning of cl 2.5.3 of the Northern Territory Planning Scheme and in any event there were serious doubts as to the effectiveness of the proposed covenants.

[50] On 21 October 2009 the Supreme Court allowed an appeal against the decision of Dr Lowndes SM. Kelly J made the following orders.

> The matter will be remitted to the Tribunal for reconsideration on its merits on the basis that:
>
> (a) the proposed restrictive covenants are capable (either alone or in combination with the other factors agreed to by the appellant) of amounting to (special circumstances); and
>
> (b) the proposed restrictive covenants once registered would be valid and enforceable.
>
> Whether those proposed restrictive covenants, in all the circumstances, in fact amount to "special circumstances" justifying the granting of consent to the proposed subdivision is a matter for the Tribunal.

[51] The respondent appealed to the Court of Appeal but the appeal was dismissed. The matter was then referred back to the Tribunal, this time constituted by Ms Fong Lim SM. Her Honour reconsidered the matter and on 20 December 2010 refused to consent to the application for subdivision. Her Honour held that although the covenants amounted to special circumstances, they did not justify the granting of consent. She was not satisfied that the covenants would in fact be more effective in protecting the environment than the existing regime under the Northern Territory Planning Scheme. The principal reasons for her Honour coming to this conclusion were: (1) the enforcement of the covenants was left to the Northern Territory Government; (2) the terms of the covenants are not certain; (3) the enforcement of the covenants would be problematic; and (4) the proposed subdivision would require further clearance of remnant vegetation.

[52] The appellant appealed to the Supreme Court against Ms Fong Lim SM's decision. The appeal was again heard by Kelly J and on 21 April 2011 her Honour dismissed the appeal. She found that the Tribunal did not make any error of law. The appellant has appealed against that decision to this Court.

Grounds of appeal

[53] The grounds of appeal pleaded in the Notice of Appeal are as follows.

> The learned judge erred:
>
> (a) in failing to conclude that the Tribunal erred in law in taking into account the alleged influence of "political motivations" in relation to the proposed covenants, particularly given the

absence of any evidence to this effect and s 85 of the *Planning Act*;

(b) in concluding that s 75(3) of the *Planning Act* was not "apt" to be used to ensure that the respondent itself could enforce the covenants and the Tribunal did not err in law in failing to proceed on the basis that s 75(3) could be used to ensure that the respondent itself could enforce the covenant;

(c) in failing to conclude that the Tribunal erred in law in taking into account that the enforcement of the covenants would be more "problematic", "expensive" and "costly" than enforcing obligations arising under the *Planning Act*, the Northern Territory Planning Scheme or under the Development Consent Authority, particularly given the absence of any evidence to this effect;

(d) in concluding that there was no power in the Tribunal to make a decision on the condition that the appellant execute and register on her land covenants containing certain particular obligations and to invite the parties to attempt to agree the precise terms of that covenant, reserving to itself the power to adjudicate on any dispute as to those precise terms.

[54] The appellant did not press ground of appeal (c). The three remaining grounds of appeal are focused on the Tribunal's and the Supreme Court's conclusions in relation to the efficacy of the proposed covenants and the jurisdiction of the Tribunal to make an "in principle" decision before making a final decision.

[55] The appellant made three primary submissions. First, the Tribunal was wrong to take into account (as a factor which militated against the effectiveness of the covenants) the fact that the enforcement of the covenants would be left to the Northern Territory Government and hence would be subject to political motivations and the Judge at first instance was

wrong not to conclude otherwise. Second, the Tribunal was wrong to conclude that the covenants could not also be enforced by the respondent as a condition of a permit under s 75(3) of the *Planning Act* and the Judge at first instance was wrong not to conclude otherwise. Third, the Tribunal was wrong to conclude that it had no power to make an "in principle" decision and reserve to itself the power to settle any disputes between the parties about the precise terms of the covenants and the Judge at first instance was wrong not to conclude otherwise.

[56] The appellant seeks orders that the appeal be allowed and the matter be referred back to the Tribunal (differently constituted).

The nature of the appeal

[57] Both the appeal from the Tribunal to the Supreme Court and the appeal from that Court to the Court of Appeal are limited to questions of law[20]. The critical question for this Court is whether Kelly J erred in law[21]. I accept the respondent's submission that in order to succeed, the appellant needs to identify an error of law on the part of her Honour that vitiates her decision[22]. A vitiating error requires that there be a real possibility, not a mere or slight possibility, that the error of law could have affected the decision[23]. A

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[20] *Planning Act* s 133(1); *Phelps v Development Consent Authority* (2010) 27 NTLR 174 at [9]; *Crestwood Phoenix Darwin Pty Ltd v Kamarakis* [1996] NTSC 104 at [2]; *Tiver Constructions Pty Ltd v Clair* (1992) 110 FLR 239 at 255.

[21] *Phelps v Development Consent Authority* (2010) 27 NTLR 174 at [10].

[22] *Leichardt Municipal Council v Seatainer Terminals Pty Ltd* (1981) 48 LGRA 409 at 419 per Moffit P; *Alice Springs Town Council v Mpweteyerre Aboriginal Corporation* (1997) 139 FLR 236 at 247 per Mildren J.

[23] *Phelps v Development Consent Authority* (2010) 27 NTLR 174 at [23].

failure by Kelly J to identify that the Tribunal made a vitiating error of law would constitute a vitiating error of law by her Honour.

The proposed covenants

[58] The proposed covenant in gross over Lot A described the person receiving the benefit as, “The Northern Territory of Australia”, and contained the following operative conditions:

> 3. USE OF LAND SUBJECT TO THIS COVENANT
>
> 3.1 The uses of the Land are limited to residential and ancillary.
>
> 3.2 The Land is NOT to be used for purposes defined by this instrument being:
>
> 3.2.1 agriculture;
>
> 3.2.2 animal Boarding;
>
> 3.2.3 home based contracting;
>
> 3.2.4 intensive animal husbandry
>
> 3.2.5 horticulture;
>
> 3.2.6 plant Nursery;
>
> 3.2.7. stables;
>
> 3.2.8. rural industry; and
>
> 3.2.9 transport terminal.
>
> 4. CLEARING OF NATIVE VEGETATION
>
> 4.1 Clearing of native vegetation is prohibited.

4.2 The purpose of clause 4.1 and the intent of the Covenant are to burden the owner with the duty not to disturb but to protect all the native vegetation on the Land.

5. OTHER COMMITMENTS BY THE OWNER

5.1 The owner will maintain fences if fences are necessary to protect the natural values of the Land.

5.2 The owner will permit use of off-road vehicles on the Land, other than on designated roads on the Land or for purposes connected with the residential usage of the Land.

5.3 At any time the existing septic system is to be replaced it must be replaced with an approved waste treatment system from which time any household effluent is to be treated by an approved waste treatment system.

5.4 The Owner agrees to use best endeavours to:

5.4.1 ensure that exotic species that threaten the natural values of the Land are eliminated or controlled and do not become established; and

5.4.2 protect the nature values of the Land.

6. RIGHT OF THE NTA TO INSPECT AND CONDUCT WORKS

6.1 The Owner will, after having been provided with reasonable notice by the NTA, allow any person who is authorised by the NTA to enter the Land in order to:

6.1.1 inspect the condition of the Land relating to the natural values of the Land relating to the terms of the Covenant; and

6.1.2 conduct any research or works required to preserve or protect the natural values of the Land or to prevent degradation of the natural (sic) of the Land.

6.2 The Covenant does not create an obligation for the NTA to inspect or conduct works or take any action in relation to the Covenant of the Land.

7. CHANGE OF OWNERSHIP

7.1 The Owner must provide notice of the Covenant to any and all prospective purchasers, lessees or licensees of the Land.

8. CHANGE TO THE TERMS OF THE COVENANT

8.1 The terms of the Covenant may be changed by:

8.1.1 The common agreement of the parties; or

8.1.2 The NTA removing the covenant.

8.2 Any change to the terms of the Covenant must be registered under the *Land Titles Act* (NT).

[59] A similar covenant was proposed for Lot B. The only variation was that clause 4 of that covenant would acknowledge that an area of 900 square metres was to be cleared to enable a house to be built on Lot B and a further area of 1800 square metres was to be selectively cleared presumably for ancillary residential purposes.

[60] The appellant contemplated that the covenants would be registered in accordance with s 74 and s 74A of the *Territory Parks and Wildlife Conservation Act* and s 169 of the *Law of Property Act* and would be enforced in accordance with the provisions of s 74A of the *Territory Parks and Wildlife Conservation Act* or s 170 of the *Law of Property Act*. Subsection 74A(2) of the *Territory Parks and Wildlife Conservation Act* provides that the Minister has power to enforce the covenant against persons deriving title from the person who entered into the agreement as if it were a restrictive covenant. Section 170 of the *Law of Property Act*

provides a covenant in gross may be enforced by the Territory, the local government body, the statutory corporation or the prescribed person who or which has the benefit of the covenant in gross.

[61] The appellant submitted that s 74(1) of *Territory Parks and Wildlife Conservation Act* made the Parks and Wildlife Commission within the meaning of that Act the beneficiary of the proposed covenants. However, the Commission was not named as the person receiving the benefit in the draft covenants.

[62] The purpose of the proposed covenants is to preclude the Land from being used for all of the permitted uses of zone R land bar residential use. The object of this is to maintain the amenity of the area and protect the environment.

Ground 2(a)

[63] The appellant submitted that the mechanisms for enforcing the covenants were equally as efficient as the mechanisms for enforcing the provisions of the *Planning Act* and the Northern Territory Planning Scheme. Enforcement of the *Planning Act*, the Northern Territory Planning Scheme and any development consent is by prosecution under Part 7 of the *Planning Act*. Enforcement of the proposed covenants would be by civil proceeding in the Local Court or the Supreme Court.

[64] Senior Counsel for the appellant argued that there was no evidence before the Tribunal to the effect that the enforcement of the covenants would be

less effective than the terms of the *Planning Act*, the Northern Territory Planning Scheme and any development consent. There was no basis in fact or law for concluding that the enforcement of conservation covenants by the Parks and Wildlife Commission or any other department or corporation would be undertaken any less effectively or with regard to materially different matters, than the enforcement by the respondent of similar provisions.

[65] The appellant's submissions cannot be sustained. The submissions mischaracterise the findings of the Tribunal. In substance Ms Fong Lim SM found that the covenants provided a less efficient mechanism for protecting the environment and the amenity of zone R land than the provisions of the Planning Act and the Northern Territory Planning Scheme. As Kelly J correctly found, this was a question of fact and a matter of judgment. In coming to this conclusion Ms Fong Lim SM relied on the following factors. (1) Part 7 of the *Planning Act* is dedicated to the enforcement of the provisions of the *Planning Act* and the relevant planning schemes. (2) Enforcement under Part 7 of the *Planning Act* involves the application of known and established criteria and procedures. (3) Both the respondent and the Minister responsible for the *Planning Act* are under a duty to ensure compliance with the provisions of the Planning Act, the Northern Territory Planning Scheme and the terms and conditions of any consent to development and to enforce the provisions of the Act. (4) Key terms in the covenants are unclear and may be subject to a variety of interpretations and

commonly used terms are defined differently and arguably more restrictively in the covenants. (5) It is unclear which Minister or Government Agency would be responsible for enforcing the covenants. (6) No Minister or Government Agency is under a duty to enforce the covenants. (7) When deciding whether to enforce the covenants or not the Minister would have regard to a number factors including what Ms Fong Lim SM described as political motivations. Some of these motivations are likely to militate against enforcement.

[66] In considering the factors referred to in par [19] above Ms Fong Lim SM had before her the draft covenants, the Planning Act and the Northern Territory Planning Scheme. She was also entitled to bring to bear her experience as a member of a specialist Tribunal, her knowledge of legal proceedings and her common sense. The onus was on the appellant to demonstrate the efficacy of the covenants as a mechanism for protecting the environment and the amenity of Zone R land.

[67] Ms Fong Lim SM did not err in law by stating that "if enforcement was left with the Northern Territory Government then that could be subject to political motivations". There is nothing to suggest that her Honour was using the term pejoratively. As Kelly J correctly stated, Ms Fong Lim SM's statement simply recognises that under our system of government there is a qualitative difference between the duties of a person or body exercising statutory functions, and decisions made by a Minister exercising the executive power of the Crown. In the latter case the Minister may take into

account a wide variety of factors including “political matters” which he or she considered to be in the public interest. Decisions are regularly made by government Ministers in the public interest which may, on some view, be detrimental to or inconsistent with environmental conservation.

Ground 2(b)

[68] In the alternative to ground (a), the appellant submitted that under s 130(4)(c) of the *Planning Act* the Tribunal could order the respondent to issue a development permit subject to any conditions the Tribunal thinks fit. The Tribunal erred by not ordering the respondent to issue a development permit subject to a condition that the appellant and her successors in title comply with the covenants when registered. If this was done, then under s 75(3) of the *Planning Act* the appellant and her successors would be required to comply with the covenants and the respondent could ensure compliance under the provisions of Part 7 of the Act.

[69] Kelly J held that s 75(3) was not apt to be used for the purpose suggested by the appellant, and the Tribunal did not err in law by assuming that if the covenants were to be registered over the land they would be enforced by an application for injunction restraining any breach of the covenants. In her Honour’s opinion the appellant’s submission ignored the fact that the permit being sought by the appellant was not a permit to use the land but a permit to develop (subdivide) the land. Further, it would be inappropriate to issue a permit to A to subdivide land on the condition of B doing something in the future.

[70] In my opinion Kelly J correctly interpreted the provisions of s 75(3) of the *Planning Act*. The consent sought by the appellant was for a development of the Land. Under s 55 of the Act the respondent may impose on a development the conditions it thinks fit and specifies in the development permit. The development permit is granted to the appellant and any conditions are conditions which constrain or regulate the appellant's development of the land. The conditions which may be imposed on the development are not conditions as to the subsequent use which the appellant's successors may make of the land. The purpose of s 75(3) of the Act is to mandate compliance with the terms and conditions of permits. It is not to restrict the uses of land which can already occur without a permit.

Ground 2(d)

[71] The appellant was able to place before the Tribunal the substance and intent, but not the finally agreed terms of the proposed covenants. This was because negotiations with the Department of Justice on behalf the Territory Parks and Wildlife Commission about the terms of the covenants had not been finalised. Consequently the appellant sought the following order from the Tribunal.

> The applicant cause to be registered over proposed Lot A, a covenant in terms substantially the same as set out in the draft at AB/5b/221 and over Lot B a covenant in terms substantially the same as set out in the draft at AB/54b/227 or on such terms as the Applicant and the Respondent may subsequently agree (with liberty to apply).

[72] The Appellant submitted that the Tribunal had power to make such an order under the provisions of s 130(4)(c) of the *Planning Act* which states:

> The Appeals Tribunal must, in writing, determine an appeal against a determination of a consent authority by taking one of the following actions:
>
> (a) …
>
> (b) …
>
> (c) ordering the consent authority to issue or vary a development permit subject to any conditions the Appeals Tribunal thinks fit.

[73] Ms Fong Lim SM declined to make the order. She was of the opinion that once the Tribunal had directed the issue of a permit on conditions it had no further power to enforce or vary those conditions and it had no supervisory role to ensure the conditions are complied with. That is not the role of the Tribunal defined by the Act.

[74] Kelly J held that the Tribunal was correct to hold that was not the role of the Tribunal as defined by the Act. Her Honour stated:

> The Appellant submitted that it was open to the Tribunal to decide the issues of principle and then to leave an element of detail which flowed from the determination of those issues for the parties to agree if possible, and to come back before the Tribunal to adjudicate upon any dispute about what ought to be in the covenants if agreement could not be reached. I consider it doubtful whether the Tribunal has power to order the consent authority to issue a permit on conditions which are not fixed, but are to be agreed between the applicant and the consent authority. It is not necessary to decide that on this appeal, because the Appellant was asking the Tribunal to do more than that. By seeking liberty to apply, the Appellant was asking the

> Tribunal to make a further decision — ie adjudicate between the DCA and the Appellant if they failed to reach agreement on the content of the covenants. There is no power under s 130 (or any other section of the Act) which would empower the Tribunal to perform that function. The Tribunal was correct to hold that that was not the role of the Tribunal as defined by the Act. The Tribunal's role, as defined in the Act is to hear and determine appeals against a refusal to issue a development permit (under s 111), appeals in the case where the consent authority does not determine an application (under s 112), appeals against a refusal to extend the period of a development permit (under s 113), appeals against the determination to alter or impose a condition in a development application (under s 114), appeals against a refusal to refund or remit a contribution (under s 115), appeals against a refusal to vary a condition of a development permit (under s 116) and appeals in some circumstances by third parties in respect of development applications (under s 117).
>
> This ground of appeal must fail[24].

[75] In my opinion, the Tribunal did not have the power to make the order sought by the appellant. Under s 130(4)(c) of the *Planning Act* the Tribunal must fix conditions which it thinks fit. It cannot do so if it is left to the parties to finalise the terms of the covenants which are in effect to constitute the conditions of the development permit. The Tribunal's role is not simply to determine a dispute between the parties but to determine whether a development should be approved in accordance with the provisions of the *Planning Act* or not. What Ms Fong Lim SM could have done if she thought there was merit in the covenants was to bring the matter back before her Honour and to give the parties an opportunity to make further submissions about the terms of the covenants. She could also have adjourned the matter to give the parties an opportunity to obtain instructions and discuss the

[24] *Phelps v Development Consent Authority and Ors* [2011] NTSC 34 at par [50] and par [51].

terms between them before she heard further submissions about the terms of the covenants. If the parties agreed on the terms of the covenants the Tribunal would still have to be satisfied that the terms were fit and proper terms before a final order of the Tribunal was made. If the parties could not agree on the terms of the covenants the Tribunal could determine what the terms of the covenants should be. The covenants could then be incorporated into the permit. Under s 6 of the *Lands, Planning and Mining Tribunal Act* the Tribunal may do all things necessary or convenient to be done in connection with the performance of its functions.

[76] Even if the Tribunal had erred in law in determining that it was not its role to draft such conditions, the error was not such as to vitiate the decision of the Tribunal because there was no real possibility that the error could have affected the decision of the Tribunal. Ms Fong Lim SM had determined on quite broad grounds that the covenants provided a less efficient mechanism for protecting the environment of the Land. The content of the covenants was only one of the factors she took into account in arriving at that conclusion.

No vitiating error

[77] I also accept the submissions of the respondent that even if the grounds of appeal did identify errors of law made by the Supreme Court, the errors of law would not have been such as to vitiate the decision of the Tribunal because there was no real possibility that any of the errors could have affected the decision of the Tribunal or the Supreme Court. The Tribunal

also dismissed the appeal for the following reasons. The proposed subdivision would require further clearing of native vegetation. There would be a decrease in the buffer between inconsistent land uses and the subdivision would create a precedent for the ad hoc rezoning of the land within the area. None of these findings are the subject of appeal to the Supreme Court.

[78] The appeal should be dismissed.
